90-1660

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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

MICHAEL SCHAEFER,
Petitioner,
vs.
KEVIN E. MCCANN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO, APPELLATE DIVISION, NORTH COUNTY JUDICIAL DISTRICT

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April 22, 1991

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QUESTIONS PRESENTED

1. Whether petitioner was denied his right to due process under the Fourteenth Amendment when the Court refused to vacate an order dismissing his appeal for failure to prosecute when the delay in prosecution was due solely to petitioner's incarceration in an unrelated matter.

2. Whether petitioner was denied his right to equal protection under the Fourteenth Amendment when the Court refused to vacate an order dismissing his appeal for failure to prosecute when the delay in prosecution was due solely to petitioner's incarceration in an unrelated matter.

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OPINION BELOW

On June 7, 1990, petitioner's appeal of the granting of a summary judgment motion in favor of respondent was dismissed for failure to timely file a Request for Relief from Default. Petitioner's Motion to Vacate the Order of Dismissal and Recall the Remittitur was denied by the Superior Court Appellate Department on August 23, 1990. Plaintiff's Petition for Reconsideration to the Superior Court Appellate Division was denied on October 29, 1990. On December 7, 1990, the California Court of Appeal, Fourth Appellate District denied petitioner's Petition for a Writ of Mandate to the Superior Court Appellate Department. Finally, on January 23, 1991, the California Supreme Court summarily denied petitioner's

Petition for Review of the Court of Appeal's denial. Orders referred to herein are found in the Appendix.

JURISDICTION

Having sought relief from the Superior Court for the Order of the Appellate Division dismissing his appeal in this action as described above, petitioner eventually sought a Petition for Writ of Mandate from the California Court of Appeal. Following denial of this Petition, petitioner sought review at the highest court of California by way of a Petition for Review which was denied on January 23, 1991. This Petition for Writ of Certiorari is filed within ninety days of that date.

The Court's jurisdiction is invoked under 28 U.S.C. section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment to the United States Constitution:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The issue of due process was specifically raised below at page thirteen of Petitioner's Petition for Writ of Mandate presented to the California Court of Appeal, Fourth Appellate District and at page eight of his Petition for Review directed to the California Supreme Court. In both cases, the issue appears in a section of the

Petition entitled, "Petitioner has been Deprived of Due Process of Law by Being Denied Access to the Courts."

Petitioner has further raised the issue of equal protection at page twelve of the Petition for Writ of Mandate and page seven of the Petition for Review. In each Petition, Schaefer discusses the similar case of *Payne v. Superior Court* (1976) 17 Cal.3d 908 in which the court held that a prisoner "had both a due process and equal protection right of access to the courts and that these rights had been violated when, inter alia, the inmate was denied a right to personally appear in court."

STATEMENT OF THE CASE

This petition arises out of a defamation action between petitioner, as plaintiff, and respondent Kevin McCann as defendant. Both parties are practicing members of the State Bar of California and the alleged defamation occurred following the close of protracted litigation respecting a real estate transaction in which the parties were adversaries. The underlying defamation case presents important issues regarding the scope of the so-called "litigation privilege" and whether or not it extends beyond the actual litigation to which it is related.

In January 1990, McCann was granted summary judgment and sanctions against Schaefer by the California Municipal Court in San Diego's North County Judicial District. Schaefer timely filed a Notice of Appeal to the Superior Court Appellate Division but did not timely file a designation of the record as is required by California Rules of Court, Rule 125.

On May 22, 1990, the Superior Court Appellate Division notified Schaefer by mail that his appeal was in default for failure to timely file the designation of the

record and that he must move for relief from default by June 1, 1990. On May 30, 1990, two days before the deadline to file his request for relief from default, Mr. Schaefer was unexpectedly incarcerated for civil contempt for having filed a Petition for Writ of Certiorari to this Court in an unrelated matter in federal court. (See U.S. Supreme Court Case No. 89-1803). He remained in custody for approximately thirty days until June 28, 1990.

Meanwhile, on June 7, 1990, the Appellate Court Division of the Superior Court dismissed the appeal of the defamation action and remittitur issued on June 25, 1990.

On June 29, 1990, on the morning following his release from prison, Schaefer telephoned the Court of Appeal in an attempt to set an ex parte hearing regarding vacating the dismissal, but was told he would have to submit his position in writing. On July 3, 1990, just a few days after his release from federal prison, Schaefer formally moved the Appellate Division to vacate its order of dismissal and recall the remittitur, setting forth in his moving papers the fact of his incarceration as justification for failure to timely file the Request for Relief from Default. The Court denied the motion, reasoning that once the remittitur had issued, a greater showing of good cause was necessary.

On September 7, 1990 Schaefer moved for reconsideration of that order, The Court requested, and Schaefer provided, a supplemental declaration regarding the period of incarceration. Nevertheless, the Petition for Rehearing was denied.

Subsequently, Schaefer requested but was denied transfer of the matter to the Court of Appeal pursuant to California Rules of Court, Rule 62. He then filed a Petition for Writ of Mandate to the California Court of

Appeal, Fourth Appellate District. This petition was summarily denied on December 7, 1990.

Finally, Schaefer petitioned the California Supreme Court for review of the denial of the Petition for the Writ of Mandate. The Supreme Court denied review on January 23, 1991.

REASONS FOR GRANTING THE WRIT

1. Petitioner was denied due process of law when the Superior Court refused to vacate its order dismissing his appeal based on petitioner's failure to timely file papers due to his incarceration on an unrelated matter.

In *Williams v. Lane* (7th cir. 1987) 851 F.2d 867, 878, the Court of Appeal, citing this Court in *Bounds v. Smith* 430 U.S. 817 and *Johnson v. Avery* 393 U.S. 483, 485 expressed the view that:

> Under the Fourteenth Amendment prisoners have the due process right to adequate, effective, and meaningful access to courts to challenge violations of their constitutional rights [citations omitted] and this access neither may be denied nor obstructed.

The *Williams* court (*supra*, at p. 871) states that although a prisoner may be deprived of many rights, he retains such fundamental rights as the right to free access to the courts, equal protection under the law and due process, subject only to the restrictions inherent in the penal system.

In the instant action, Mr. Schaefer initially failed to timely file a designation of the record on appeal and was informed by the court that he should file a Request for Relief from Default by June 1, 1990. Such a request, had

it been made, would likely have been granted since Schaefer, a sole practitioner, had reasonable justification for not having timely filed the designation of the record on appeal in the first place: among other things, he was, at the time, involved in hearings in Delaware and Los Angeles, was a candidate for election, and was engaged in the drafting of a Petition for Writ of Certiorari.

However, on May 30, 1990, Mr. Schaefer was unexpectedly incarcerated, rendering him unable to timely file a Request for Relief from Default.[1] He was, therefore, deprived "adequate, effective, and meaningful" access to the courts due to his imprisonment.

Although it is established that the courts have the power to dismiss an action to "ensure the orderly administration of justice and the integrity of their orders . . . [t]his power is limited, however, by the requirements of due process." (*Phoceene Sous-Marine, S.A. v. U.S. Phosmarine, Inc.* (9th cir., 1982) 682 F.2d 802, 806). "Due process is flexible and calls for such procedural protections as the particular situation demands." (*Regents of the University of Minnesota v. The National Collegiate Athletic Association* (8th cir., 1977) 560 F.2d 352.)

Here, petitioner's appeal of the trial court's summary judgment of the underlying action was dismissed due to his failure to comply with the Superior Court's order to file a Request for Relief from Default by the designated date. This dismissal was based on California Rules of Court, Rule 133 subsection (c) and was entirely discretionary. Although the Superior Court may have been well

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[1]Given the zeal with which petitioner has pursued his remedies with respect to the issues presented herein, there can be little doubt that, but for his incarceration, petitioner would have indeed filed a timely Request for Relief from Default with the Superior Court.

within its discretion to dismiss the appeal when the designated date came and went with no word from Mr. Schaefer, it was clearly an abuse of discretion to refuse to vacate the order and recall the remittitur upon learning of Schaefer's incarceration and total inability to file the appropriate papers. This position is borne out in *Sigliano v. Mendoza* (9th cir., 1981) 642 F.2d 309 which states:

> Where the drastic sanctions of dismissal or default are imposed, . . . the range of discretion is narrowed and the losing party's non-compliance must be due to willfulness, fault or bad faith. [citing *Societe International v. Rogers* 357 U.S. 197, 212.]

Although *Sigliano* deals specifically with failure to provide discovery, the rationale is analogous to the present situation. The Court continues:

> *Due process requires that neither dismissal nor preclusion of evidence that is tantamount to dismissal may be imposed when failure to comply is due to circumstances beyond the recalcitrant's control.* [emphasis added.] (See also *United States v. Sumitomo Marine and Fire Ins. Co.* (9th cir., 1977) 617 F.2d 1365.

Here, there is no suggestion that petitioner's failure to timely file the Request for Relief from Default was due to willfulness, fault or bad faith. To the contrary, Schaefer's omission was due to circumstances entirely beyond his control. In such a case, the flexibility inherent in any consideration of due process should have been exercised and some result other than dismissal, with its accompanying total loss of rights, should have been reached.

The California Supreme Court recognized the magnitude of this issue in *Payne v. Superior Court* (1976) 17 Cal.3d 908, in which a writ of mandate issued directing

the court below to vacate a default judgment in a civil action which had been entered against petitioner during a period of incarceration when he was unable to defend himself. There, Justice Mosk declared:

> Few liberties in America have been more zealously guarded than the right to protect one's property in a court of law. This nation has long realized that none of our freedoms would be secure if any person could be deprived of his possessions without an opportunity to defend them "at a meaningful time and in a meaningful manner." (*Fuentes v. Shevin* (1972) 407 U.S. 67, 80. [citations omitted.] In a variety of contexts, the right of access to the courts has been reaffirmed and strengthened throughout our 200-year history.

How much more compelling are these words when the "property" of which one is being deprived is his good name.

2. Petitioner was denied equal protection under the law when the Superior Court refused to vacate its order dismissing his appeal based on petitioner's failure to timely file papers due to his incarceration on an unrelated matter.

It is established that the denial of access to the courts constitutes a prima facie violation of the equal protection clause of the Fourteenth Amendment. (*Payne v. Superior Court* (1976) 17 Cal.3d 908, 919) As discussed above, the right to defend one's property in a court of law is fundamental. A prisoner is effectively denied that right, while free persons are not. But for his incarceration, petitioner would have timely filed the documents necessary to preserve his rights. Due solely to his incarceration, he was unable to do so. Therefore, his fundamental

right to free access to the courts and equal protection under the law has been violated.

3. The denial of motion to vacate must be reversed because the State can show no compelling interest which would justify the denial of petitioner's fundamental rights to due process and equal protection.

If the state has infringed on a fundamental right of a citizen, as petitioner urges it has in this case, then the state action may only be upheld if the state can show a compelling state interest (*Boddie v. Connecticut* (1971) 401 U.S. 371, 377). The state has the additional burden of showing that its interest could not have been satisfied by alternative, less restrictive means. (*Payne v. Superior Court* (1976) 17 Cal.3d 908, 914)

In the instant case, allowing petitioner to file a late designation of record would have resulted in no prejudice to the opposing party. The only state interest in denying petitioner's request must have been an administrative desire to clear its docket. Surely this "interest" cannot rise to the level of "compelling" and therefore defeat petitioner's fundamental rights to due process and equal protection with respect to reasonable and meaningful access to the Courts.

CONCLUSION

For the foregoing reasons, this Court is respectfully requested to issue its Writ of Certiorari to the Superior Court of California, County of San Diego, Appellate Division commanding that Court to vacate its order of dismissal of petitioner's appeal and issuance of the remittitur, and to allow petitioner to file a late designation of record thus allowing the important issues raised by this action to be litigated in the California Courts.

Respectfully submitted,

MICHAEL SCHAEFER
3252 Holiday Court, Suite 103
La Jolla, California 92037
Petitioner, Appearing Pro Se

April 22, 1991

SUPERIOR COURT — STATE OF CALIFORNIA
COUNTY OF SAN DIEGO

APPELLATE DEPARTMENT

MICHAEL SCHAEFER,
Plaintiff & Appellant,

vs.

KEVIN E. MCCANN,
Defendant & Respondent.

Superior Court No. 623331
Municipal Court No. 89548
North County Judicial District

ORDER OF DISMISSAL

Appellant(s) having failed to file a designation of record for the appeal filed February 7, 1990, pursuant to Rules 124 and 125 of the California Rules of Court, the appeal is hereby dismissed, pursuant to Rule 133(c) of the California Rules of Court.

Dated: June 7, 1990

WAYNE L. PETERSON
Presiding Judge
Appellate Department

EXHIBIT E

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

APPELLATE DEPARTMENT

MICHAEL SCHAEFER,
Plaintiff and Appellant,

vs.

KEVIN E. MCCANN,
Defendant and Respondent.

Superior Court Case No. 623331
Municipal Court Case No. 89548
(North County Judicial District)

ORDER

Appellant's motion to recall remittitur and to vacate the order of dismissal is denied. California Rules of Court Rule 144(a) provides that after the certified copy of the judgment has been remitted to the court below, the superior court has no further jurisdiction of the appeal or of the proceedings thereon. Rule 144(d) provides that a remittitur may be recalled by order of the court on its own motion, on motion after notice supported by affidavits, or on stipulation setting forth facts which would justify the granting of a motion.

If the court after issuing the remittitur decides that the judgment was obtained or rendered by means so improper that it should not stand, the remittitur may be recalled for the purpose of correcting that judgment or rendering a new and different judgment. If the judgment was rendered unintentionally and inadvertently by reason of

the court's own mistake of fact or lack of knowledge of the circumstances, the remittitur may be recalled.

This court finds that the dismissal in this case was not rendered by means so improper that it should not stand. The Notice of Appeal was filed on February 7, 1990. A notice of default for failure to designate the record was mailed to appellant on May 22, 1990, indicating that a request for relief from default must be filed by June 1, 1990. No such request was made, and the dismissal was rendered on June 7, 1990. Remittitur issued on June 25, 1990. Appellant has not established that the dismissal was entered by means so improper that it should not stand. There was no mistake of fact or lack of knowledge by the court. While a motion for relief from default requires a showing of good cause, once remittitur has issued a greater showing is necessary. Appellant has not met this burden.

This court further denies appellant's request for a hearing on the matter. California Rules of Court Rule 104(b) provides that motions may be disposed of after opposition has been filed or the time for filing opposition has expired. The reviewing court may place any motion on calendar for hearing or may otherwise dispose of the motion as it may determine. This court concludes that the motion can properly be disposed of without a hearing.

DATED: August 23, 1990

_____ P.J.

PETERSON

EXHIBIT I

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO

APPELLATE DEPARTMENT

MICHAEL SCHAEFER,
Plaintiff & Appellant,

vs.

KEVIN E. MCCANN
Defendant & Respondent.

Superior Court Case No. 623331
Municipal Court No. 89548
(North County Judicial District)

ORDER

Appellant(s) petition to recall remittitur and to reconsider the dismissal of the appeal is hereby denied.

Dated: October 29, 1990

_____ P.J.
PETERSON

_____ J.
MUDD

_____ J.
CAZARES

Copies to all parties

COURT OF APPEAL,
FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MICHAEL SCHAEFER,
Petitioner,

VS.

THE SUPERIOR COURT OF SAN DIEGO COUNTY,
Respondent;

KEVIN E. MCCANN,
Real Party in Interest.

Superior Court No. 623331
Municipal Court No. 89548
D013441

THE COURT:

The petition for writ of mandate has been read and considered by Justices Benke, Huffman and Froehlich. The petition is denied.

FROEHLICH, Acting P.J.

Copies to: All Parties

Fourth Appellate District, Division One,
— No. D013441 S018787

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

IN BANK

MICHAEL SCHAEFER,
Petitioner

VS.

SAN DIEGO SUPERIOR COURT,
Respondent

KEVIN E. MCCANN,
Real Party In Interest

Petition for review DENIED.

_____
Chief Justice